

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

INDOOR BILLBOARD NORTHWEST
INC.; CATHERINE E. COX;
DANIEL D. GESTWICK IRA R/O;
PAIGE C. GIST; BERNICE GOLDIN
IRA by ROCHELLE GOLDIN and
STEVE GOLDIN for BERNICE
GOLDIN ESTATE; DONALD J.
HANDAL REVOCABLE TRUST U/O;
DONALD J. HANDAL IRA R/O;
MARGOT S. HANDAL TR U/A;
EDWARD J. HARTNETT; GEOFFREY
M. HOLMES; GEOFFREY W.
HOLMES; LEE M. and BECKY
HOLZMAN; MARITAL TRUST U/W
WILLIAM KATZ; PEGGY W.
KAUFMANN IRA; RICHARD J.
KAUFMANN DECEDENT'S TRUST;
KAY M. KAZMAIER; STANLEY A.
STAR; JAMES SHU LEVITZ; ALAN
and NADINE WOLFF; and MICHAEL
WOLFF,

3:12-CV-01338-BR

OPINION AND ORDER

Plaintiffs,

v.

M2 SYSTEMS CORPORATION,

Defendant.

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BROWN, Judge.

This matter comes before the Court on Defendant's Motion (#47) to Amend the Court's Order Denying Attorneys' Fees.

For the reasons that follow, the Court **DENIES** Defendant's Motion.

BACKGROUND

On July 25, 2006, Defendant M2 Systems Corporation entered into a Promissory Note with Matthew Szulik,¹ a Connecticut resident, in which M2 Systems "promise[d] to pay [Szulik] . . . on April 24, 2007, or sooner as otherwise provided herein (the Maturity Date), the principal amount of Two Million Fifty Thousand (\$2,050,000) Dollars" plus interest. Compl., Ex. A at

¹ Szulik is not a party to this action.

1. Also on July 25, 2006, Defendant and Szulik entered into a Security Agreement relating to the Promissory Note setting out Szulik's "rights, remedies, and benefits." On that same day Defendant and Szulik, among others, entered into an Escrow Agreement related to the Promissory Note and Security Agreement.

In their Complaint Plaintiffs allege the Promissory Note "was assigned on February 24, 2009, to a holder in due course² and assigned by such holder in due course to the plaintiffs on February 24, 2009, April 1, 2009, and November 6, 2009, as holders in due course."

On July 24, 2012, Plaintiffs filed an action against Defendant in this Court alleging a claim for breach of the Promissory Note.

On September 21, 2012, Defendant filed a Motion to Dismiss for Lack of Jurisdiction and Venue or, Alternatively, Motion to Transfer Venue and a Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted.

Plaintiffs filed Responses to both Motions on October 26, 2012. On November 13, 2012, Defendant filed its Replies.

On January 16, 2013, the Court entered an Order directing Plaintiffs to "provide a record that specifies with particularity the citizenship of each Plaintiff."

² Plaintiffs do not identify in their Complaint who the holder in due course was in the February 24, 2009, transfer.

On January 21, 2013, Plaintiffs filed the Declaration of Amanda Soden in response to the Court's January 16, 2013, Order.

On January 29, 2013, the Court entered an Order noting Soden's Declaration did not set out sufficient information for the Court to determine each Plaintiff's citizenship. The Court, therefore, directed Plaintiffs to provide the Court with information as to the domicile and citizenship of each Plaintiff.

On January 31, 2013, Plaintiffs filed a Supplemental Declaration of Amanda Soden in which Soden testified

[e]ach of the natural plaintiffs is a domiciliary of the place of that person's residence as set forth in paragraphs 2 and 3 of my said declaration. Each of the accounts, trusts and estates is permanently present in the states specified in paragraph 3 of my said declaration.

Supple. Decl. of Amanda Soden at ¶ 2.

On February 6, 2013, the Court entered an Opinion and Order granting Defendant's Motion to Dismiss for lack of jurisdiction. Also on February 6, 2013, the Court entered a Judgment dismissing without prejudice this matter for lack of jurisdiction.

On February 27, 2013, Defendant filed a Petition for Attorneys' Fees and a Bill of Costs.

On June 18, 2013, the Court issued an Opinion and Order denying Defendant's Motion for Attorneys' Fees and Bill of Costs.

On July 9, 2013, Defendant filed a Motion to Amend the Court's Order Denying Attorneys' Fees. On August 16, 2013, Plaintiffs filed a Response. The Court took Defendant's Motion

under advisement on August 28, 2013.

DISCUSSION

In its June 18, 2013, Opinion and Order the Court concluded it had jurisdiction to resolve Defendant's Motion, Oregon law applies to determine Defendant's entitlement to attorneys' fees and costs, and Defendant was not a prevailing party for purposes of attorneys' fees under Oregon Revised Statute § 20.077.

Defendant does not assert the Court erred when it concluded it had jurisdiction to resolve Defendant's Motion or that Oregon law applies. Defendant, however, asserts the Court erred when it concluded Defendant was not a prevailing party under § 20.077.

Defendant again contends it is a prevailing party because it achieved success in its effort to dismiss this matter for lack of personal jurisdiction. Plaintiffs continue to assert Defendant is not a prevailing party because it did not obtain a final judgment against Plaintiffs on the merits of Plaintiffs' claims.

I. Summary of June 18, 2013, Opinion and Order

In its June 18, 2013, Opinion and Order, the Court noted neither Oregon's statute providing for attorneys' fees in actions involving breach of contract (§ 20.096) nor the Promissory Note defines the requirements to be considered a prevailing party under the Note. Accordingly, the Court presumed the phrase has its ordinary, plain meaning.

In their Response to Defendant's Motion for Attorneys' Fees Plaintiffs relied on a number of cases to support their assertion that Defendant is not a prevailing party for purposes of § 20.096(1) because Defendant did not obtain a final judgment on the merits in this action. The Court, however, noted those cases did not, in fact, provide guidance on the issue because one applied California law and the other applied the pre-2001 version of Oregon Revised Statute § 20.096, which defined a prevailing party for purposes of that provision as "the party in whose favor *final* judgment or decree is rendered." Or. Rev. Stat. § 20.096(5)(1999)(emphasis added). As the Court noted, in 2001 the Oregon Legislature redefined a prevailing party as one who "receives a *favorable* judgment . . . on the claim." Or. Rev. Stat. § 20.077(2) (emphasis added).

In its Reply to its Motion for Attorneys' Fees Defendants stated Oregon courts had not addressed whether a dismissal for lack of personal jurisdiction establishes the defendant is a prevailing party under § 20.096(1). Defendant, therefore, relied on *Kaib's Roving R.Ph. Agency, Inc. v. Employment Department*, 338 Or. 433 (2005), which involved a motion for attorneys' fees and costs pursuant to Oregon Revised Statute § 183.497(1). This Court concluded *Kaib* did not shed light on whether a dismissal for lack of personal jurisdiction constituted "receiv[ing] a favorable judgment on a claim."

Neither party provided the Court with any case in which a court addressed whether a party may be a prevailing party for purposes of § 20.077 when that party had obtained a judgment dismissing the matter without prejudice for lack of personal jurisdiction rather than on the merits of the plaintiff's claims. The Court, therefore, analogized to the use of prevailing-party language in other contexts and concluded Defendant was not a prevailing party within the meaning of § 20.077. Accordingly, the Court denied Defendant's Motion for Attorneys' Fees. In addition, because the Court concluded Defendant was not a prevailing party, the Court also denied Defendant's request for an award of costs.

II. Analysis of Defendant's Motion to Amend

Defendant conceded in its Reply in support of its Motion for Attorneys' Fees that Oregon courts have not addressed whether a party is a prevailing party under § 20.077 when the party has obtained dismissal of a matter for lack of personal jurisdiction. Defendant, nevertheless, contends in its Motion to Amend that the Court erred when it based its definition of a prevailing party on an analogy to federal law rather than looking to Oregon law.

Defendant points to *Dean Vincent, Inc. v. Krishell Laboratories, Inc.*, 271 Or. 356 (1975), an Oregon Supreme Court case decided before the 2001 amendment to Oregon Revised Statute § 20.096, to support its assertion that it is a prevailing party

in this matter. Specifically, Defendant points to the following analysis:

[D]efendant was the prevailing party because a voluntary nonsuit terminates the case in a defendant's favor. Even though the termination was without prejudice and plaintiff could file another case upon the same cause of action, these facts did not prevent defendant from being the party in whose favor the judgment was rendered in that particular case.

Id. at 359.

As noted, however, before the 2001 amendment, § 20.096 defined prevailing party as "the party in whose favor final judgment . . . is rendered." After 2001 a prevailing party is defined as one who "receives a favorable judgment . . . on the claim." As one court in this district explained with respect to this language,

the prevailing party in an FED action is "the party in whose favor final judgment is rendered." ORS 90.255. Under that definition, the only issue is whether a final judgment was entered, regardless of whether any decision was rendered on the merits of the claim. That is a far different definition for prevailing party than contained in ORS 20.077(2) which contemplates at least some adjudication on the merits of the claim.

O.N. Equity Sales Co. v. Estate of Pence, No. CV-10-1426-ST, 2011 WL 2198307, at *2 (D. Or. May 4, 2011), *adopted* June 7, 2011, by Senior District Court Judge Malcolm Marsh. This Court agrees.

Accordingly, the Court denies Defendant's Motion to Amend the Court's Order Denying Attorneys' Fees.

CONCLUSION

For these reasons, the Court **DENIES** Defendant's Motion (#47) to Amend the Court's Order Denying Attorneys' Fees.

IT IS SO ORDERED.

DATED this 8th day of October, 2013.

/s/ Anna J. Brown

ANNA J. BROWN
United States District Judge